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**IN THE  
COURT OF APPEALS OF INDIANA**

TONDA BETH NICHOLS.

Appellant-Plaintiff,

VS.

REX DAVID MINNICK and  
R. DAVID MINNICK, INC., d/b/a  
COMMERCIAL PROPERTIES.

Appellees-Defendants.

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No. 53A01-0606-CV-268

APPEAL FROM THE MONROE CIRCUIT COURT  
The Honorable E. Michael Hoff, Judge  
Cause No. 53C01-0206-PL-1056

**April 13, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Plaintiff, Tonda Beth Nichols (Nichols), appeals the trial court's judgment in favor of Appellee-Defendant, Rex David Minnick and R. David Minnick, Inc., d/b/a Commercial Properties, (Minnick) in Nichols' action seeking the return of a \$22,500.00 commission Minnick earned when he sold Nichols' interest in the Bedford Hideaway Lounge, Inc., (the Hideaway).

We affirm.

## ISSUE

The sole issue for our review is whether the trial court erred in entering judgment in favor of Minnick in Nichols' action seeking the return of Minnick's commission.

## FACTS AND PROCEDURAL HISTORY

In 1998, Nichols decided to sell the Hideaway, a gentleman's club, located in Bedford, Indiana. She met with real estate broker Minnick, who recommended a sale price of \$245,000.00 to \$250,000.00. Nichols and Minnick entered into a listing agreement, which awarded Minnick a 10% commission for selling the property. A few days later Minnick brought James Blickensdorf (Blickensdorf) to see the property.

Blickensdorf offered Nichols \$225,000.00 for the Hideaway. Nichols accepted the offer and entered into a stock purchase agreement to sell the Hideaway to Blickensdorf on contract. Nichols received a \$25,000.00 down payment, and a promissory note for \$177,500.00 from Blickensdorf. The stock

purchase agreement provided that Blickensdorf would pay Minnick the \$22,500.00 commission subject to the terms of a separate agreement between the two men.

Two years later, in 2000, Blickensdorf defaulted on the stock purchase agreement. Shortly thereafter, he paid Nichols the balance due on the promissory note and Nichols transferred all of the stock in the Hideaway to Blickensdorf. That same day, Blickensdorf deeded the Hideaway to Richards Properties, Inc., (RPI), which had given Blickensdorf the money to pay Nichols. At that time, Minnick's employee, Richard Evans, owned 90% of RPI and Minnick owned a small share of the corporation. Six months later, Minnick became the owner of 95% of RPI without paying for the stock.

In May 2001, RPI and Blickensdorf filed suit against Nichols alleging that she had failed to convey to Blickensdorf the parking lot adjacent to the Hideaway. During a deposition taken in the case, Nichols learned that Minnick loaned Blickensdorf money to purchase the Hideaway. Specifically, Minnick loaned Blickensdorf \$37,500.00--\$22,500 to pay his (Minnick's) commission and \$15,000 to help Blickensdorf pay Nichols the down payment. RPI and Blickensdorf eventually voluntarily dismissed their suit against Nichols.

Thereafter, in June 2002, Nichols filed a complaint against Minnick wherein she alleged that he breached the duty that he owed to her as her real estate agent. Specifically, Nichols alleged that Blickensdorf and RPI were nothing more than straw men for Minnick, who had been the actual owner and operator of the

Hideaway since the July 1998 sale. Nichols sought the return of Minnick's 10% sales commission as well as prejudgment interest and attorneys fees.

At the April 2006 trial, Minnick testified that he had previously loaned money to Blickensdorf to purchase a Blimpie's in Bloomington. Blickensdorf repaid the money, and Minnick hoped to have a similar experience with Blickensdorf's purchase of the Hideaway. Minnick further testified that at the time Blickensdorf defaulted on the Hideaway stock purchase agreement, Minnick had invested \$40,000.00 to \$50,000.00, which he was at risk of losing if Nichols foreclosed on the agreement. To protect himself, he borrowed money and gave it to Blickensdorf to pay Nichols. Minnick created RPI with the hope he could save the Hideaway.

On June 2, 2006, the trial court issued a ten-page order that included findings of fact and conclusions of law as requested by Minnick. Specifically, the order provided in relevant part as follows:

45. If this court concluded that Minnick set out to take over the Hideaway business through subterfuge when Nichols first retained him, and that Minnick employed Blickensdorf as a shill, and manipulated the price paid to Nichols, the court would have no hesitation in concluding that Minnick should disgorge the commission he received. However, as previously stated, this court finds that it is more likely that Minnick was simply trying to earn a commission when he first interested Blickensdorf in the business. The steady slide into Minnick's ownership of the business started when Minnick made the poor decision to help Blickensdorf finance the purchase.

46. Minnick's action in concealing that he loaned Blickensdorf \$15,000.00 for the down payment was a breach

of duty of complete good faith that Minnick owed to Nichols.

47. Nichols had reason to know of a relationship between Minnick and Blickensdorf from the provision in the sales document that Blickensdorf would pay Minnick's commission. In light of that, Minnick's action in concealing that he loaned Blickensdorf \$15,000.00 for the down payment was not a serious violation of a duty of loyalty or seriously disobedient conduct such that Minnick should be ordered to repay the commission he received to Nichols.

48. Forfeiture of Minnick's commission is not an appropriate equitable remedy in this case.

49. Nichols has not proven that she suffered monetary damage as a result of Minnick's actions as her agent in the sale of the business.

50. Because Nichols has not proven that she suffered monetary damage, and because forfeiture of Minnick's commission is not an appropriate equitable remedy in this case, there are no damages to be assessed against Minnick.

51. Because Plaintiff has not proven damages judgment should be entered in favor of Defendants.

Appellant's Appendix, pp. 49, 53-54.

Nichols now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Standard of Review*

Our standard of review in cases where a party has requested findings and conclusions under Indiana Trial Rule 52(A) is well settled. First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. Balicki v. Balicki, 837 N.E.2d 532, 535 (Ind. Ct. App. 2005), trans. denied. In deference to the trial court's proximity to the issues, we

disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. Id. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Id. Challengers must establish that the trial court's findings are clearly erroneous. Id. Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. Id. at 535-36.

## II. *Analysis*

Nichols contends that the trial court's findings do not support the judgment. Specifically, she contends that the trial court's finding that Minnick breached the duty that he owed to her should have in and of itself resulted in a judgment for the forfeiture of Minnick's commission as a matter of law. In support of her contention, Nichols directs us to Smitley v. Nau, 238 N.E.2d 681, 143 Ind. App. 113 (1968) and Wenzel v. Hopper & Galliher, P.C., 830 N.E.2d 996 (Ind. Ct. App. 2005).

In Smitley, this court cited the well settled Indiana law that a broker cannot recover a commission if, unknown to his principals, he has an adverse interest in the transaction. Smitley, 238 N.E.2d at 683. Here, however, the trial court found that Nichols had reason to know about the agreement between Minnick and Blickensdorf and that Minnick had no adverse individual interest in the transaction. Nichols does not challenge these findings, and Smitley does not support her claim.

In Wenzel, this court cited Restatement (Second) of Agency § 469, which

states in pertinent part that the agent loses his right to compensation following a serious violation of a duty of loyalty. Wenzel, 830 N.E.2d at 1001. We also noted that requiring an agent to pay back compensation earned during a period in which the agent was breaching a duty owed to the principal without a requirement for the principal to demonstrate a financial loss is an equitable remedy. Id. The applicability of an equitable remedy depends upon the facts and circumstances of each case. Wilshire Servicing Corp. v. Timber Ridge Partnership, 743 N.E.2d 1173, 1178 (Ind. Ct. App. 2001), trans. denied, (deciding the applicability of equitable subrogation).

Here, the trial court found that Minnick was simply trying to earn a commission when he first interested Blickensdorf in the business. The court also found that because Nichols had reason to know of the relationship between Minnick and Blickensdorf, Minnick's action in concealing that he loaned \$15,000.00 to Blickensdorf for the down payment was not a serious violation of his duty of loyalty to Nichols. Based upon these findings, the trial court concluded that forfeiture was not an appropriate remedy in this case. Nichols does not challenge the court's findings, and we find no error in the court's conclusion.<sup>1</sup>

### CONCLUSION

Based upon the foregoing, we find that the trial court did not err in entering judgment in favor of Minnick on Nichols' complaint seeking the return of Minnick's commission.

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<sup>1</sup> In light of this relevant Indiana authority, Nichols' authority from other jurisdictions is not persuasive.

Affirmed.

KIRSCH, J., and FRIEDLANDER, J., concur.